

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 47, Charged Party,)	Case 31-CD-223008
)	
and)	
)	
TITAN SERVICES, INC., Charging Party,)	
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and)	
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L.K. COMSTOCK NATIONAL TRANSIT, INC.,)	
)	
Employer,)	
)	
and)	
)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, AFL-CIO, Party-In-Interest,)	
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 47, Charged Party,)	Case 31-CD-222858
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and)	
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L.K. COMSTOCK NATIONAL TRANSIT, INC.,)	
)	
Charging Party,)	
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and)	
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TITAN SERVICES, INC., Employer)	
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and)	
)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, AFL-CIO, Party-In-Interest.)	

POST HEARING BRIEF

INTRODUCTION

The International Union of Operating Engineers, Local 12 moves to quash the notice of hearing because this matter is not properly before the NLRB for determination under Section 10(k) of the Act because (1) No reasonable case exists to believe a violation of Section 8(b)(4)(D) has occurred, (2) this is a work preservation and contractual matter, and (3) an agreed-upon method for the voluntary adjustment of this dispute exists and is binding on all parties.

Local 12 filed two grievances against L.K. Comstock and Titan Services, Inc. because it violated the Referral System provisions in the collective bargaining agreement, which is the Project Labor Agreement between Los Angeles County Metropolitan Transportation Authority and the Los Angeles/Orange County Building and Construction Trades Council its Affiliated Unions and Other Signatory Unions (“PLA”). Local 12’s grievances and the processing of those grievances under the provisions of the PLA did not constitute a claim to the work in dispute.¹

This case is far from the traditional 10(k) factual scenario where two unions have separate CBAs with the Employer and each union claims that its contract covers the disputed work assigned and controlled by the Employer. The underlying grievances relate to contractual violations by Comstock and Titan on the Crenshaw/LAX Transit Corridor Project (“Project”) under the PLA.

The work is the operation of the hydraulic boom truck when it is hoisting material, specifically steel, hollow poles, on the Project. Local 12 is a signatory to the PLA and L.K.

¹ The following abbreviated forms will be used in this Brief: “Local 12” for the International Union of Operating Engineers, Local 12, AFL-CIO; “Comstock” for L.K. Comstock National Transit, Inc.; “Titan” for Titan Services, Inc.; “Local 47” for the International Union of Electrical Workers Local 47; “Bx” for Board Exhibits; “L12x” For Local 12’s Exhibits; “L47x” for Local 47’s Exhibits; “Cx” for Comstock’s Exhibits; “Tx” for Titan’s Exhibits; and “Tr.” For Transcripts.

Comstock and Titan Services, Inc., have both signed a Letter of Assent agreeing to be bound to the terms and conditions of the PLA. Local 47 is not signed to the PLA.

Comstock and Titan were obligated to follow the terms and conditions of the PLA, which require all work to be dispatched through the hiring halls of unions signatory to the PLA. The Contractors failed to do so and instead used Local 47's hiring hall to procure workers to the Project and failed to register their employees through the appropriate signatory union's hiring hall. Local 12 filed a grievance against each Contractor for violating the dispatching procedures in the PLA.

Under Article VII Referral System the PLA allows a Contractor to utilize its employees who are either represented or non-represented to perform work on the PLA so long as they register on the appropriate signatory union's hiring hall. The grievances filed by Local 12 did not and cannot seek to require the reassignment of work from Local 47 members to Local 12 members primarily because the "Core Employee" language would prevent such reassignment. This "Core Employee" language in the PLA allows Contractors to abide by the terms and conditions of the PLA, while at the same time meeting its obligations to utilize specifically skilled workers to perform the necessary work on the Project. The terms and conditions of the PLA make it irrelevant what union represents these workers so long as the appropriate Referral provisions are followed.

Additionally, Local 12 has dispatched hydraulic boom truck ("HBT") operators to perform the hoisting of material on the Project. Local 12's grievances attempted to preserve this work for Local 12 members and on behalf of other Building and Construction Trades Unions signatory to the PLA.

Moreover, the parties are bound to a voluntary adjustment dispute mechanism and thus the Board lacks jurisdiction to resolve this dispute. As this case is inextricably tied to the obligations

under a PLA, this matter is factually distinguishable from prior cases before the Board and presents novel issues, which the Board has yet to resolve.

Finally, if the Board determines that reasonable cause exists that Section 8(b)(4)(D) has been violated then Local 12 argues that it deserves the assignment of the work in dispute.

FACTS

PLA and the Project

A Project Labor Agreement exists between the Los Angeles County Metropolitan Transportation Authority (“Metro”) and the Los Angeles/Orange County Building and Construction Trades Council (“Council”) and the Signatory Unions to that Agreement. L12x1(Ex.4). The Crenshaw/LAX Transit Corridor project is a light-rail line connector project governed by the terms of the PLA. Local 12 is a signatory to the PLA. *Id.* at 28.

Letter of Assent

The PLA provides that all contractors and subcontractors awarded work by Metro must accept the PLAs terms and must execute a “Letter of Assent” binding each contractor/subcontractor to all “terms and conditions of the ...PLA.” *Id.* at 4; Cx5; Tx5. The signed Letter of Assent must be submitted to Metro prior to beginning any work covered by the PLA. *Id.* Titan and Comstock both executed a Letter of Assent. Cx5; Tx5.

Work in Dispute

The parties stipulated that the work in dispute is the operation of the hydraulic boom truck when it is hoisting material, including but not limited to steel hollow electrical poles, on the Crenshaw/LAX Transit Corridor project. The poles installed are hollow and have no electrical wires when they are lifted by the HBT. Tr. Tr 226: 6-11. These poles are then placed on foundations.

Local 12s Grievances under the PLA

On April 24, 2018 Local 12 filed a grievance under the terms of the PLA for Titan's failure to dispatch workmen in violation of Article VII of the PLA, REFERRAL. L12x1 (Ex. 13). On April 30, 2018 Local 12 filed a similar grievance for Comstock's failure to dispatch workmen in violation of the PLA. L12x1(Ex.12). The PLA incorporates by reference Local 12's Master Labor Agreement for specific dispatching procedures for all craft labor. L12x1(Ex.4), (Ex.6). Local 12's exclusive hiring hall dispatches workers without discriminating based on Union membership or affiliation. *Id.*

CBA between Local 47 and Contractors

It was testified that Comstock first signed a contract to perform work on the Project with the general contractor Walsh/Shea Corridor Constructors. It then signed a letter of assent to be bound to the Outside Line Construction agreement with Local 47. Cx3 It was only after that Comstock signed a Letter of Assent to be bound to the PLA. Cx5

The Outside Line Construction agreement that the Contractors and Local 47 are bound to only contains the following language regarding economic action: "1.4 There shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement." Cx2. The Outside Line agreement does not contain a "hydraulic boom truck" classification. *Id.*

Pre-Job Conference

On March 27, 2018 Business Representative Ken Hunt discovered that Comstock was assigning work to Local 47. Hunt immediately voiced his concern that Local 47 was not signatory to the PLA and asked them to be removed. He stated that Local 47 was not signatory to the PLA and should not be listed on this work assignment or future pre-job work assignments.

Most of those in attendance belonging to other unions agreed with Hunt. Tr. 1523-1524. This pre-job conference was held prior to the facts giving rise to the grievance.

Grievances Filed by Local 12

Business Representative for Local 12, Ken Hunt testified at the hearing that he filed and processed the grievances against Comstock and Titan. Local 12's Master Labor Agreement is incorporated by reference in the PLA. Tr. 1263: 13-23. The hydraulic boom truck job classification is included in Local 12's MLA. Tr. 1268: 2-8; L12x1(Ex6) at 175.

Hunt testified that he filed the first grievance because he observed "a workman operating the hydraulic boom truck that was not registered or referred through Local 12's hiring hall." Tr. 1517: 15-18. Hunt explained that to perform hoisting work on the PLA a contractor must procure workers through Local 12's hiring hall. Hunt explained that Local 12 has the recognized classification of hoisting and specifically hydraulic boom truck under California's Prevailing Wage rates, which are incorporated by reference in the PLA. Tr. 1546: 4-14; L12x1(Ex4); L12x13; L12x14.

Hunt testified that Local 12's referral system does not discriminate based on union membership. Tr. 1573-1575. Local 47 members would not be prevented from being dispatched to work on the Project through Local 12's hiring hall. Tr. 1582: 15-21. Also, if a contractor requests a worker and Local 12 cannot fill the request within forty-eight (48) hours, that contractor can procure a worker from any source. L12x1(Ex6).

Hunt explained that the request for damages in the grievances is part of the contractual violation for failing to procure workers through Local 12's hiring hall. Tr. 1592-1593; L12x1(Ex6) at 40-41. These are stipulated damages for failing to use Local 12's referral system. *Id.* Those damages go directly to the Operating Engineers Health and Welfare Fund, not Local 12. *Id.* Hunt

explained that at no time during the processing of the grievances did Local 12 claim the HBT work at issue. Tr. 1633.

According to Local 12, the work in dispute is the operation of the HBT when it is hoisting material on the Project. It does not matter that it is hoisting material to support the OCS system. Tr. 1602: 2-6. However, Hunt also testified that he observed Local 12 members operating the HBT for electrical contractors on this PLA. L12x9. Evidence was also proffered that Local 12 has previously dispatched HBT operators to perform hoisting work on the Project. L12x12.

Performance Requirements

The Performance Requirements for the Overhead Catenary System states that “experience linemen” must be utilized for the furnishing and installation of the OCS under 3.4. Cx6 at 10. There is no mention of the installation poles in section 3.4. Cx6 at 10; Tr. 1809: 16-18. That provision makes no reference to which union must perform the work or the labor obligations of the contractor or subcontractor. Cx6 at 10. These performance requirements are part of a larger contract between the prime contractor and Metro that is at least an 800-page document, if not much larger.

The Contractors and Local 47 argue that Local 47 members must be utilized to perform OCS work based on this section of these Performance Requirements.

METRO

Michael Flores, who is the compliance manager who administers the PLA for Metro testified that the Letter of Assent to the PLA would bind the Contractors to all the terms and provision of the PLA, without any exclusions. Tr. 901: 3-5. Flores specifically referenced the exclusions from the PLA under Article II, 2.4. L12x1(Ex.4) at 6. According to Flores, Metro “does not have any PLA exception that pertains to L.K. Comstock or Titan.” Tr. 902: 12-13. He further

testified that Metro requires a written statement from the prime contractor, Walsh/Shea Corridor Constructors, requesting exclusions sent to Metro for approval prior commencing work.” Tr. 903: 2-22. According to Metro, no exclusion has ever been requested from Metro by the prime contractor, Walsh/Shea, nor from Comstock or Titan. Tr. 903: 23-25 – 904:5.

In particular, Flores explained that he knew of know exclusion for the HBT operation on the Overhead Catenary System. Tr. 904:7-16. This included reference to the “NEC NFPA 7 code.” According to Flores he would know if such exclusion or exemptions from the PLA work coverage were made because all exclusions or exemptions are approved through the unit that he works for. Tr. 905: 12-22.

According to Metro, Contractors and Subcontractors are bound to the PLA through the Letter of Assent. 905:23-25 – 906:1. Flores stated that according to Metro the work in dispute in the two grievances filed by Local 12 was not excluded or exempted from the PLA and was therefore covered by the PLA. Tr. 912: 16-25 – 913:1-3. He also explained that all reference to Unions and Union halls and collective bargaining agreement all related to Unions signatory to the PLA. Tr. 943:24-25 – 944:1-2; 948:2-4, 17-25; 949:1-4.

The Los Angeles/Orange County Building Trades

The only witness that testified at the hearing who negotiated the PLA was Ray Van der Nat. Van der Nat testified that he negotiated the PLA, both the predecessor and successor, on behalf of the Los Angeles/ Orange Counties Building and Construction Trades Council (“Council”). He drafted both proposals and drafts of both versions of the PLA (introduced by Local 12 and Comstock). Tr. 1049-1051. One provision of importance to the Council during negotiations was the Core Employee language because. The Council intended to maximize the work opportunities for members of the respective signatory unions to the PLAs. Tr. 1052: 10-17.

According to Van der Nat, the signatory unions are the primary source of all labor on the PLA. 1081: 12-16. The only exceptions to this rule are for core employees or in situations where a signatory union cannot fulfil a manpower request, at which point a worker may be procured from any source, i.e. “off the street.” Tr. 1082:2-10

The core language in the PLAs allows contractors to utilize their, typically, non-union employee and then refer a worker from the appropriate signatory union hiring hall. Tr. 1053: 8-18. The appropriate union hiring hall is determined by California’s Department of Industrial Relations’ wage determinations which delineate the proper classifications of the unions. Tr. 1053:19-25 – 1054: 1-5.

Van der Nat also explained that a union that was not signatory to the PLA would still be able to submit members to perform work on the PLA through the same core employee language. Tr. 1056:11-18. According to Van der Nat:

Any other union that would not have signed the agreement, those members or employees should be considered as core employees, and therefore the non-union contractor would be able to use either non-union employees or employees represented by a different union as a core employee if they met the definition or requirement.

Tr. 1056: 19-24.

Van der Nat also testified that the exclusion language in the PLA 2.4.8 came from Metro. Tr. 1074:12-14. He further states that any collective bargaining agreement between contractors not signatory to the PLA are **“irrelevant for purposes of this agreement, because the contractor has agreed in signing the letter of assent, that he’s going to comply with this agreement. And**

this agreement requires those employees work under the terms of the PLA and the master labor agreement.” Tr. 1104: 16-21.

Finally, Van der Nat on cross-examination revealed that Richard Resnick, the administrator of the Plan for the Resolution of Jurisdictional Disputes, informed Van der Nat that Local Unions are bound to the Plan through their affiliation with an International Union that is a party to the Plan. Tr. 1150:7-11.

The General Contractor, Walsh/Shea Corridor Constructors

Mandy Powers, Compliance Manager for Walsh/Shea testified at the hearing that she had experience interpreting the PLA. Powers testified that the OCS work was not excluded under the PLA. Tr. 1188: 16-23. She also testified that Walsh/Shea requested hydraulic boom truck operators to perform hoisting work on the Crenshaw/LAX Transit Corridor Project. Tr. 1200: 14-25.

Local 12 Skills and Training

Larry Hopkins, Director of Training provided testimony about the Operating Engineers Training Trust (“OETT”). Tr. 1315: 12-15. Hopkins explained that the HBT is a mobile crane. Tr. 1320: 20-25. Local 12 guides HBT operators into two specific courses specifically on crane instruction. L12x5 and 6. The “OETT” provides hands on HBT training at one of its training sites. Tr. 1346: 4-19. Hopkins testified that an important aspect of training HBT operators involves learning to operate the crane in or around electrical charged lines and infrastructure. Tr. 1364. He further explained the complexity of operating cranes. Tr. 1373. Training involves operating a HBT but also “tagging, rigging, wire rope” ... handling, etc. Tr. 1379.

According to Hopkins the operation of a HBT is more likely to be the subject of an accident than a larger crane. Tr. 1383. California requires all HBT operators to be certified to operate a crane by an Accredited Certifying Entity. L12x7. The Operating Engineers Certification Program

(“OECP”) qualifies to meet these legal requirements under California law and goes above and beyond the minimum criteria that other certifying agencies such as the NCCCO exhibit. L12x8.

The OECP offers certification for HBTs. *Id.* at 1, 3

The International Affiliates and NABTU

Local 12 is affiliated with its International parent organization, the International Union of Operating Engineers (IUOE). IUOE is a member of North America’s Building Trades Unions (NABTU) and has been a member of NABTU (previously the Building and Construction Trades Department) at all times relevant to this matter. L12x1. Local 47 is affiliated with its International parent organization, the International Brotherhood of Electrical Workers (IBEW). IBEW is also a member of NABTU and has also been a member of NABTU at all times relevant to this matter.

Id. Billy Affidavit at pars. 2-3.

The Plan for the Resolution of Jurisdictional Dispute

Article X of the NABTU’s Constitution states:

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

Id. at pars. 4-5, L12x1 (Ex 1) at p. 28.

Member Unions of NABTU are beholden to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”). Per the Plan’s Preamble: The Agreement is entered into by and among the Building and Construction Trades Department, AFL-CIO, on behalf of its constituent National and International Unions and their affiliated local unions . . . and the Employer Associations signatory to this Agreement . . . *Id.* at pars. 6-7, Exhibit 2, p. 16.

Moreover, the Plan clearly states at Article II, Section 1(a) that:

A Union may become stipulated to the Plan by virtue of its affiliation with the Department or its National or International Union's affiliation with the Department, a signed stipulation form setting forth that it is willing to be bound by the terms of the Plan or a provision in a collective bargaining agreement.

Id., Exhibit 2, p. 17.

The PLA stipulates to the Plan under **Article XII Jurisdictional Disputes**:

12.2 All Jurisdictional disputes on this Project, between or among Building and Construction Trades Unions and C/S/E/Ds shall be settled and adjusted according to the present Plan established by the Building and Construction Trades Department. Decisions rendered shall be final, binding, and conclusive on the C/S/E/Ds and Unions. ... *Id.* at pars. 8-10, L12x1(Ex 3).

On June 29, 2018, the IUOE's Director of Jurisdiction, Terry George, filed a notice of violation with the Plan by LK seeking withdrawal of the pending charge and resolution of any jurisdictional dispute in accordance with the Plan. In response, the Plan Administrator, Richard Resnick, instructed the parties to cease the alleged violations and process any jurisdictional disputes through the Plan. On July 2, 2018, George filed a similar notice of violation with the Plan by Titan seeking the same relief in accordance with the Plan. George supplemented the IUOE's position in these matters on July 6, 2018 reiterating to the Resnick that all parties are stipulated to the Plan and that the work at issues is covered in the PLA. L12x1(Ex5). A hearing was scheduled on July 12, 2018 before Arbitrator Paul Greenberg.

In his award, Arbitrator Greenberg ruled that all of the parties are stipulated to the Plan. In particular, the Arbitrator held that the International Brotherhood of Electrical Workers, Local 47 is bound to the Plan as an affiliate of IBEW performing work in the construction industry. The Arbitrator ordered Comstock and Titan to withdraw the underlying charges and dismiss this matter.

Local 47 was directed to cease any participation in the processing of the charges and withdraw all threats of economic action.

CONTRACTUAL PROVISIONS

I. PROJECT LABOR AGREEMENT

PROJECT LABOR AGREEMENT THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY

METRO

THE LOS ANGELES/ORANGE COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL AFFILIATED WITH THE BUILDING & CONSTRUCTION TRADES DEPARTMENT (AFL/CIO) AND THE SIGNATORY CRAFT COUNCILS AND LOCAL UNIONS

ARTICLE I DEFINITIONS

...

1.6 "Contractor/Subcontractor/Employer" (C/S/E) means any individual firm, partnership or corporation, or combination thereof, including joint ventures, which is an independent business enterprise and which has entered into contract with the LACMTA or any of its contractors or subcontractors or owner operators of any tier, with respect to the construction of any part of the Project(s) under contract terms and conditions approved by the LACMTA which shall incorporate this Agreement. A C/S/E may bid for and be awarded construction of any part of the Project without regard as to whether the C/S/E is otherwise a party to any collective bargaining agreement.

1.7 "Core Worker" as used in this Agreement shall mean an employee whose name appeared on the C/S/E active payroll for sixty (60) of the one hundred (100) days immediately before the award of the Project Work to the C/S/E and meets all standards required by applicable local, state or federal law or regulation.

...

1.16 "Letter of Assent" means the document which formally binds each C/S/E to adherence to all the forms, requirements and conditions of this Agreement that each C/S/E (of any tier) must sign and submit to the LACMTA's designated office prior to beginning any work covered by this Agreement, and a copy of which will be provided by the designated LACMTA office to the Council.

...

1.23 "Union" or "Unions" or "Signatory Unions" means the Los Angeles/Orange Counties Building and Construction Trades Council ("Council") affiliated with the Building & Construction Trades Department (AFL/CIO), Craft International Unions and any other labor organization signatory to this Agreement, acting in their own behalf and on behalf of their respective affiliates and member organizations whose names are subscribed hereto and who have through their officers executed this Agreement.

ARTICLE III EFFECT OF AGREEMENT

3.1 By executing the Agreement, the Unions and the LACMTA agree to be bound by each and every provision of this Agreement. This Agreement is not intended to supersede collective bargaining agreements between any of the Contractors/Employers performing construction work on the Project and Union Signatory thereto except to the extent the provisions of this Agreement are inconsistent with such collective bargaining agreement, in which event the provisions of this Agreement shall apply. However, such does not apply to work performed under the NTL Articles of Agreement, the National Cooling Tower Agreement, the National Stack Agreement, the National Transit Division Agreement (NTD), or the National Agreement of the International Unions of Elevator Constructors and all instrument calibration work and loop checking shall be performed under the terms of the UA/IBEW Joint National Agreement for Instrument and Control Systems Technicians, however, provisions of this Agreement dealing with Work Stoppages and Lock-Outs, Work Assignments and Jurisdictional Disputes, and Settlement of Grievances and Disputes shall apply to such work. It is specifically agreed that no later agreement shall be deemed to have precedence over this Agreement unless signed by all parties signatory hereto who are then currently employed or represented at the Project.

...

ARTICLE IV WORK STOPPAGES AND LOCKOUTS

4.1 During the term of this Agreement there shall be no strikes, picketing, work stoppages, slowdowns or other disruptive activity for any reason by the Union, its applicable Local Union or by any employee, and there shall be no lockout by the Contractor. Failure of any Union, Local Union or employee to cross any picket line established at the Project site is a violation of this Article. Any damages resulting from any violation of this Agreement will be paid by the violating party.

4.2 The Union and its applicable Local Union shall not sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity at the Contractor's project site and shall undertake all reasonable means to prevent or to terminate any such activity. No employee shall engage in activities which violate this Article. Any employee who participates in or encourages any activities which interfere with the normal operation of the Project shall be subject to disciplinary action, including discharge, and if justifiably discharged for the above reasons, shall not be eligible for rehire on the Project for a period of not less than ninety (90) days.

4.3 The Unions agree that they shall not sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity at the Project site. If any Union is notified of any offsite work stoppage, strike, picketing or other disruptive activity by the Union that will economically and/or materially affect the completion of the Project, the Union will promptly make good efforts to cease such Project work disruption. Any such costs that economically and/or materially harm the LACMTA shall be borne by the affected Union and made payable to the LACMTA.

4.4 Neither the Union nor its applicable Local Union shall be liable for independent acts of employees for whom it has no responsibility. The International Union General President or Presidents will immediately instruct, order and use the best efforts of his office to cause the Local Union or Unions to cease any violations of this Article. An International Union complying with this obligation shall not be liable for unauthorized acts of its Local Union, The [sic] principal officer or officers of a Local Union will immediately instruct, order and use the best efforts of his office to cause the employees the Local Union represents to cease any violations of this Article. A Local Union complying with this obligation within two business days shall not be liable for unauthorized acts of employees it represents. The failure of the C/S/E to exercise its right in any instance shall not be deemed a waiver of its right in any other instance.

...

4.6 Expedited Arbitration will be utilized for all work stoppages and lockouts. In lieu of or in addition to any other action at law or equity, any party may institute the following procedure when a breach or violation of this Article IV is alleged to have occurred:

...

ARTICLE VI UNION SECURITY

...

6.2 No employee covered by this Agreement shall be required to join any Union as a condition of being employed, or remaining employed, for the completion of the Project work. The C/S/E shall, however, require all employees working on the Construction Contract, to the extent which this Agreement applies, for a cumulative total of eight (8) or more working days, to comply with the applicable Union's security provisions for the period during which they are performing on-site Project work to the extent, as permitted by law, of rendering payment of the applicable monthly dues and any working dues only, as uniformly required of all craft employees while working on the Project and represented by the applicable signatory unions. However, any employee who is a member of a Union at the time the referring Union refers the employee, shall maintain that membership in good standing while employed on the Construction Contract.

...

ARTICLE VII REFERRAL

7.1 The C/S/Es recognize that the Unions shall be the primary source of all craft labor employed on the Construction Contract for the Project. The Unions will exert their best efforts to recruit and identify individuals, particularly Local or National Targeted Workers, as well as those referred by the Jobs Coordinator, for entrance or reentrance into the labor/management apprenticeship programs, and to assist individuals in qualifying and becoming eligible for such programs. C/S/Es utilizing core employees shall follow the procedures outlined below:

7.1.1 The C/S/E worker shall be considered a Core Worker for the purposes of this Article if the employee's name appeared on the C/S/E's active payroll for sixty (60) of the one hundred (100) days immediately before the award of the Project Work to the C/S/E/ and meets the required definition of 1.7 above,

7.1.2 Each C/S/E shall identify Core Workers in their Employment Hiring Plan and shall provide payroll records evidencing the worker's qualification as a Core Worker upon request by LACMTA or any other party to this Agreement. The number of Core Workers on the Project for C/S/Es covered by this Agreement shall be governed by the following procedure; one Core Worker shall be selected and one worker from the hiring hall of the affected trade or craft and this process shall repeat until such C/S/E's requirements are met or until such C/S/E has hired five (5) such Core Workers for that craft, whichever occurs first. Thereafter, all additional employees in the affected trade or craft shall be hired exclusively from the applicable hiring hall list. In the event of a reduction-in-force or layoff, such will take place in a manner to assure that the number of remaining Core Workers in the affected craft does not exceed, at any time, the number of others working in that craft who were employed pursuant to other procedures available to the C/S/E under this Agreement. This provision applies only to employees not currently working under a current master labor agreement and is not intended to limit transfer provisions of current master labor agreements of any trade. As part of this process, and in order to facilitate the contract administration procedures, as well as appropriate benefit fund coverage, all contractors shall require their "Core Work Force" and any other persons employed, other than through the referral process, to register with the appropriate hiring hall, if any, of the signatory union prior to said employee's first day of employment at the project site.

7.2 C/S/Es shall be bound by and utilize the registration facilities and referral systems established or authorized by this Agreement and the signatory Unions when such procedures are not in violation of state or federal law or in conflict with provisions set forth in this Agreement.

7.3 In the event that referral facilities maintained by the unions are unable to fill the requisition of a C/S/E for Local or National Targeted Workers within forty-eight (48) hours (excluding Saturdays, Sundays and holidays), the C/S/E shall be free to obtain Local or National Targeted Workers from any source. If the Union's registration and referral system does not fulfill the requirements for specific classifications of covered classifications requested by any C/S/E within forty-eight (48) hours (excluding Saturdays, Sundays and holidays), that C/S/E may use employment sources other than the union registration and referral services, and may employ any

applicants meeting such standards from any other available source. The contractor shall inform the Union of any applicants hired from other sources within 48 hours of such applicant being hired, and such applicants shall immediately register with the appropriate hiring hall, if any.

7.3.1 The C/S/Es must document all efforts made to comply with the targeted hiring process to locate and hire Local Targeted Workers and National Targeted Workers.

7.3.2 The C/S/E shall inform the Unions, Job Coordinator and LACMTA of the name, address, worker craft classification and social security number of any workers hired from other sources upon their employment on the Project(s).

...

7.10 C/S/Es agree to only use the Craft Request Form (Exhibit B) and the procedures written therein to request any and all workers from Unions with a concurrent transmittal of such request to the Jobs Coordinator, including workers qualified as Local Targeted Workers, National Targeted Workers, and/or general dispatch.

...

ARTICLE VIII WAGES & BENEFITS

8.1 All employees covered by this Agreement shall be classified in accordance with work performed and paid by the C/S/E the hourly wage rates for those classifications in compliance with the applicable prevailing wage rate determination established pursuant to applicable law. If a prevailing rate increases under law, the C/S/E shall pay that rate as of its effective date under the law. Notwithstanding Section 2.3, this Agreement does not relieve C/S/Es from any independent contractual or other obligation they may have to pay wages in excess of the prevailing wage rate as required.

8.2 C/S/E shall pay contributions to the established employee benefit funds in the amounts designated by the Unions and make all employee-authorized deductions in the amounts designated by the Unions; provided, however, that the C/S/E and Union agree that only such bona fide employee benefits as accrue to the direct benefit of the employees (such as pension and annuity, health and welfare, vacation, apprenticeship, training funds, etc.) shall be included in this requirement and required to be paid by the C/S/E on the Project; and provided further, however, that such contributions shall not exceed the contribution amounts set forth in the applicable prevailing wage determination. Notwithstanding Section 2.3, C/S/Es directly signatory to one or more of the Schedule A Agreements are required to make all contributions set forth in those Schedule A Agreements without reference to the forgoing. The LACMTA shall not be liable for determining the level of contributions, deductions or payments for benefits and the LACMTA shall not be liable for or required to make contributions, deductions or payments for benefits in excess of or different from those set forth in the prevailing wage determinations.

...

ARTICLE XI JOINT ADMINISTRATIVE COMMITTEE

11.1 The Parties to this Agreement shall establish a six (6) person Joint Administrative Committee (JAC). This JAC shall be comprised of one (1) representative of the LACMTA Construction Manager; one (1) representative of the LACMTA Administrative Services; one (1) representative of the prime contractor, and three (3) representatives of the signatory Unions to be appointed by the Council established to monitor compliance with the terms and conditions of this Agreement. Each representative shall designate an alternate who shall serve in his or her absence for any purpose contemplated by this Agreement.

11.2 The JAC shall meet as required to review the implementation of this Agreement and the progress of the Project and resolve problems or disputes by majority vote with such resolutions to be binding on all signatories of the Agreement as provided herein. A unanimous decision of the JAC shall be final and binding upon all Parties. However, the JAC shall have no authority to make determinations upon or to resolve grievances arising under this Agreement.

...

ARTICLE XII JURISDICTIONAL DISPUTES

12.1 The assignment of work will be solely the responsibility of the C/S/E performing the work involved and such work assignments will be in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan) or any successor Plan.

12.2 All Jurisdictional Disputes on this Project, between or among Building and Construction Trades Unions and C/S/Es shall be settled and adjusted according to the present Plan established by the Building and Construction Trades Department. Decisions rendered shall be final, binding, and conclusive on the C/S/Es and Unions. A decision shall not award back pay or any other damages for a misassignment of work, nor may any party bring an independent action for back pay or any other damages based upon a decision of an Arbitrator, except that a party may seek back pay or damages for a period of non-compliance with an Arbitrator's decision from any party that fails to comply with such decision within seven (7) business days of the issuance of the Arbitrator's decision.

12.3 All Jurisdictional Disputes shall be resolved without the occurrence of any strike, work stoppage, or slow-down of any nature and the C/S/E's assignment shall be adhered to until the dispute is resolved. Individuals violating this section shall be subject to immediate discharge.

ARTICLE XVII PRE-JOB CONFERENCE

17.1 Each C/S/E will conduct a pre-job conference with the appropriate affected Union(s) and the Council prior to commencing work. The C/S/E shall notify the Council ten (10) days in advance of all such conferences. Subcontractors of all tiers will be advised in advance of all such conferences and shall participate. All work assignments should be disclosed by the C/S/E at a pre-job conference held in accordance with industry practice. Should a Union dispute a work assignment which has been disclosed and discussed at the pre-job meeting with the Union Representative present, it shall proceed to file a claim with the Plan pursuant to Article XII of this Agreement. Should there be any formal jurisdictional dispute raised, the Prime Contractor shall be promptly notified. If the C/S/E intends to change the work assignment after the pre-job conference or to make an assignment of work not previously known, the C/S/E must notify the appropriate affected craft union(s) prior to the commencement of work. If any Union has a dispute over such changed or newly discovered assignment, such Union shall proceed to file a claim with the Plan pursuant to Article XII of this Agreement.

II. LOCAL 12'S MASTER LABOR AGREEMENT

MASTER LABOR AGREEMENT
BETWEEN
THE INTERNATIONAL
UNION OF OPERATING
ENGINEERS
AND THE
SOUTHERN CALIFORNIA
CONTRACTORS ASSOCIATION, INC.

...

**ARTICLE I
GENERAL PROVISIONS**

...

B. Coverage

5. This Agreement shall cover and apply to all work falling within the recognized jurisdiction of the Union signatory to this Agreement.

(a) It shall cover work on buildings, heavy, highway, and engineering construction, including the construct of, in whole or in part, or in improvement or modification thereof, including any structure or operations which are incidental thereto, the operation of all equipment, vehicles, and other facilities, including helicopters, used in connection with the performance of the aforementioned work and services, and the assembly, maintenance and repair of all equipment, vehicle and other facilities, which has normally and customarily been performed by unit employees, and including without limitation the following types or classes of work.

(b) Street and highway work, grading and paving excavation of earth and rock, grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage, electric transmission line and conduit projects, water supply, water development, reclamation, irrigation, draining and flood control projects, water mains, pipelines, sanitation, and sewer projects, dams, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, quarrying of breakwater or riprap stone, foundations, pile driving, piers, locks, river and harbor projects, breakwaters, jetties, dredging, tunnels, soil testing and building/construction inspector. This shall include the use of all robots used in any industry, including the nuclear field.

...

(d) The construction, erection, alteration, repair, modification, demolition, addition or improvement, in whole or in part, of any building structure, including oil or gas refineries and incidental structures, solar energy installations and appurtenances thereto, also including any grading, excavations or similar operations which are incidental thereto, or the installation, operation, maintenance and repair of equipment, and other facilities used in connection with the performance of such building construction except where such structures are an incidental or supplemental part of highway and engineering construction, as defined in this Article.

(e) All concrete form work, including, but not limited to, the fabrication, construction, placing, erection, rigging and hoisting, stripping and removing of all forms and operation of the forklift, loaded, pettibone or mobile equipment in reference to all of the above work.

(f) All work in connection with tilt-up slabs, including, but not limited to, benchmarks, layout, setting or all forms, blockouts, metal door and window jambs, templates for bolts, lift points, knee braces, all stripping of forms (whether or not to be reused) rigging, setting, plumbing, and lining, welding, drilling, ledger bolts, setting ledgers, setting of expansion joints and caulking. Also to include to forms for stairs and loading docks (setting and stripping), installation of all doors including roll-up, installation of laminated beams or precast structures, and operation of the forklift in reference to all of the above work.

(g) All work connection with the hoisting of materials which are to be used by the Carpenters or Building Tradesmen will be rigged, guided and handled by employees covered by this Agreement.

(h) The layout, rigging, tagging, signaling, cutting, burning, welding, chain sawing, driving, setting and pulling of soldier piles, sheet piles, soldier beams and casings, together with all necessary walling, shoring, underpinning, struts, bracing, capping and lagging necessary for construction of subterranean structures of all types to include, but not limited to subways, subway stations, buildings, storm drains, sewers, pipelines and all open cut and cover construction projects. Fabrication, construction, removal and stripping of all forms both inside and outside the tunnels and drains to include form liners and membranes, whether they be spray on, glue on, tack on, composed of any and all building materials to include plastic, neoprene, high density

polyethylene, vinyl cork or any other natural or artificial material. Construction of all covers and access mats to include all necessary rigging for setting and removing whether intermittently or regularly. Installation and removal of all timber decking.

...

(j) The placing, handling, moving and erection of all materials which fall within the description of work set forth in this Agreement from the site of delivery on the job to the point of the job where the work is to be performed. The erecting and moving of all scaffolds and the moving and handling of all materials to be used in the erection of scaffolding.

ARTICLE II UNION RECOGNITION

...

G. Definitions:

1. Group "A" Status:

(a) Workmen who, as employees have performed work covered by this Agreement and who have registered and have been available for work, as employees at least two and one-half (2½) years accumulatively within the five (5) years immediately preceding registration at the Dispatch Office in the territorial jurisdiction of the Union and who are available for employment shall attain Group "A" Status and may be requested by a Contractor by name subject to the foregoing and confirmed in writing by the Contractor no later than forty-eight (48) hours after the workman reports for work. There shall be no job soliciting.

(b) Workmen shall have "A" Status extended for any period of incapacity or military service or for any period during which they are transferred by a Contractor to a job or project outside the geographical area of this Agreement and are there employed by such Contractor or by a joint venture with which said Contractor is associated. "A" Status to be extended to Owner-Operators who previously had "A" status.

(c) Workmen who have completed the Apprenticeship Training Program established under this Agreement shall obtain "A" Status. Any apprentice having been cancelled for just cause after a written and specific notice and a full and fair hearing by the Apprenticeship Committee, or who has dropped out of the program of his own accord shall not be permitted to register for employment with the Local Union for a period of two (2) years after cancellation or until such time as he would have graduated from the program, whichever time period is shorter.

(d) Workmen employed by an Employer at the time of his Employer signing this Collective Bargaining Agreement, shall obtain "A" Status after two and one-half (2½) years

in conformity with Subparagraph (a). Workmen in this category, however, may be called by name by such former Employer.

2. Group "B" Status:

Workmen who have lost their preference as Group "A" workmen or who have performed work of the type covered by this Agreement under a Collective Bargaining Agreement with the Union and who are registered on the out-of-work list and are available for employment.

3. Group "C" Status:

Workmen whose names are entered on the out-of-work list and who are available for employment but who fail to qualify for Group "A" or Group "B". Workmen dispatched on two occasions and who fail to qualify for the work to which they were dispatched shall not be dispatched until requested for a former Employer.

...

1. Hiring - Union Responsibility

(a) The Union shall establish and maintain open and nondiscriminatory employment lists for workmen desiring employment on work covered by this Agreement and such workmen shall be entitled to registration and dispatch subject to the provisions of this Article.

(b) The District Dispatching Office will furnish, in accordance with the request of the Contractor, each such qualified and competent workman from among those entered on said lists to the Contractor by use of written referral, in the order of preference outlined in "Definitions" of this Article, and the selection of workmen for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, Union membership, by-laws, rules, regulations, constitutional provision or any other aspect or obligation of Union membership, policies or requirements.

...

2. Hiring - Contractor Responsibilities:

(a) The Contractor shall first call a District Dispatching Office (as referred to above) for such workmen as he may from time-to-time need, and the office shall furnish the Contractor the required number of qualified and competent workmen of the classifications needed and requested by the Contractor, strictly in accordance with the provisions of this Article.

...

(c) Reasonable advance notice (but no later than twenty [20] hours prior to the required reporting time) will be given by the Contractor to the Dispatching Office upon ordering such workmen, and, in the event that forty-eight (48) hours after such notice, the Dispatching

Office does not furnish such workmen, the Contractor may procure workmen from any other source or sources. If men are so employed, the Contractor will immediately report to the Dispatching Office each such workman by name.

...

J. 1. The Contractor and the Union will not discriminate against any person with regard to employment or Union membership because of his or her ancestry, age (40 and above), color, disability (physical and mental, including H.I.V. and AIDS), genetic information, gender, gender identity, gender expression, marital status, medical condition (genetic characteristics, cancer or a record or history of cancer), military or veteran status, national origin (includes language restrictions), race, religion (includes religious dress and grooming practices), sex (includes pregnancy, childbirth, breastfeeding and/or related medical conditions), sexual orientation and hereby declare their acceptance and support of existing laws. This shall apply to hiring, placement, training during employment, rates of pay or other forms of compensation, layoff or termination and application to Union membership.

...

N. A Contractor found violating any portion of this Article as determined by the Grievance procedure, shall immediately pay compensatory damages in the amount of one (1) day's pay at the highest journeyman rate under this Agreement for each day or portion thereof the violation occurred, such damages to be made payable to the Operating Engineers Health and Welfare Fund and the Contractor Union's out-of-work list. If the Contractor is found in violation of the Subcontractor clause, such damages shall be paid to the Union.

...

APPENDIX B
CRANES, PILEDIVING AND HOISTING
EQUIPMENT CLASSIFICATIONS
AND WAGE RATES

...

GROUP V

Hydraulic Boom Truck/Knuckleboom

ARGUMENT

I. THE NOTICE OF HEARING MUST BE QUASHED BECAUSE THERE IS NO REASONABLE CAUSE TO BELIEVE SECTION 8(b)(4)(D) OF THE ACT HAS BEEN VIOLATED

Section 8(b) of the Act makes it an unfair labor practice to strike, picket, boycott, make threats, or coerce where an object is: "forcing or requiring any employer to assign particular

work to employees in another labor organization or in another trade, craft, or class ...” 29 U.S.C. §158(b)(4)(D) (2018). Here, the Board must determine if reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005).

A. THERE ARE NO TWO COMPETING CLAIMS TO THE WORK IN DISPUTE BECAUSE LOCAL 12 IS SIMPLY ENFORCING THE REFERRAL SYSTEM PROVISIONS OF THE PROJECT LABOR AGREEMENT—IT IS NOT SEEKING THE REASSIGNMENT OF THE WORK FROM LOCAL 47 TO LOCAL 12 MEMBERS

1. LOCAL 12 REQUESTS THAT THE BOARD EXTEND THE HOLDING IN *CAPITOL DRILLING* TO A SITUATION WHERE A UNION SEEKS TO ENFORCE THE HIRING/REFERRAL VIOLATIONS UNDER A PLA AGAINST A CONTRACTOR

The grievances filed against Comstock and Titan are not jurisdictional in nature. Local 12 filed a grievance over a violation of Article VII of the PLA, Referral provision. Article VII, 7.1 states that the “Unions shall be the primary source of all craft labor employed on the Construction Contract for the Project.” It then offers a strict guideline for “utilizing core employees.” A “Core Worker” is an employee who has been on the Employer’s payroll for two to three months before the award of the Project. Contractors can utilize core workers based on an established 1-to-1 ratio of core workers to worker dispatched from the hiring hall of the affected trade or craft, up to 5.²

Further, these core workers must register with the appropriate hiring hall of the signatory union prior to commencing work at the site. L12x1 (Ex. 4) at 13. If the registration facilities of the signatory Unions cannot fill the request by the Contractor then that Contractor can procure workers from any source but must be registered under the appropriate signatory union’s hiring hall.

² At the hearing, Counsel for the LA/OC Building Trades, who negotiated the language, testified that this provision does not apply to those employees working under a current master labor agreement as referenced in 7.1.2 of the PLA. Van Der Nat further clarified that this only applies to those working under a master labor agreement of a signatory union to this PLA. Thus, this provision would not apply to Local 47 represented members.

A traditional jurisdictional dispute is a controversy between two or more unions where both unions disagree over which union should be assigned the work. In such cases two or more unions seek an assignment from a neutral contractor caught in a bind because it cannot satisfy both unions or either union. *See Associated General Contractors of America, Inc. v. International Union of Operating Engineers, Local 701*, 529 F.2d 1395, 1397 (9th Cir. 1976). This is not the case here. Local 12 took no action throughout the processing of the Referral/Hiring grievances that would constitute a claim to the work. Instead, it processed the Referral system violations through the grievance steps in the PLA and never threatened any economic action against the Contractors.

If a union files a grievance under its CBA with a general contractor alleging violation of a union-signatory subcontracting clause, and seeks only enforcement by arbitration of that clause, the dispute is not jurisdictional. *Laborers (Indiana Dist. Council) (Capitol Drilling Supplies)*, 318 N.L.R.B. 809 (1995). In *Capitol Drilling* the Board considered whether a grievance filed by an Operating Engineers (“OE”) union involved a jurisdictional dispute. The contractor had entered into a CBA with the OE union, while its subcontractor assigned work to the Laborers union. The OE union filed a grievance against the general alleging a violation of the subcontracting provision prohibiting work to be subcontracted to a non-OE signatory contractor. The OE union did not engage in a strike or a work stoppage or demand that the subcontractor reassign the work to the OE. *Id.* at 809. The OE posited that it “never sought the work in question from [the subcontractor].” *Id.* at 810. The Board held that these are “two entirely separate disputes, even though both ultimately concern the same work.” *Id.* It acknowledged that both disputes are related, because “the first union’s successful prosecution of this grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union” *Id.*

Despite this, the Board held that because the OE sought only to enforce the CBA it never claimed the work in dispute. It explained that the purpose of Section 10(k) was to protect neutral employers from being caught in the middle of disputes between two unions, which was not the case in *Capitol Drilling*. *Id.* at 811. The Board further espoused a policy consideration that its ruling would encourage contractors to “abide by lawful signatory clauses in agreements into which they have voluntarily entered.” *Id.*

Applying the rationale in *Capitol Drilling* to the facts at hand, the question becomes whether the grievances filed by Local 12 against the Contractors can be perceived as a claim to the operation of the hydraulic boom truck when it was hoisting material on the Crenshaw/LAX Transit Corridor light-rail project. Here, while the underlying grievances were filed against the contractor Comstock and its subcontractor Titan, all other facts suggest that the rationale in *Capitol Drilling* must control. Local 12 did not engage in work stoppages or other coercive or economic actions against Comstock or Titan. It never requested that Comstock or Titan reassign the work from Local 47 to Local 12. **It merely sought to enforce the hiring/referral system in the PLA.**

The PLA’s Referral provisions allow for the procurement of workers from any source, whether those workers are union or non-union. There is no distinction. If Comstock or Titan wanted to utilize Local 47 members then they could have done so under the Core Worker language in the PLA subject to the 1-to-1 ratio. While Comstock and Titan argue that Local 47 members contain a specific skillset and are bound by Metro’s performance requirement to use experienced linemen, the PLA allows for Contractors to utilize such workers if the signatory union’s dispatch hall cannot fill the specific request by the contractor within forty-eight (48) hours. In fact, Contractors’ can procure workers from any source subject only to the requirement that they register the individual with the signatory union’s hiring hall. All of this points to the conclusion that Local

12 did not and could not seek the work performed by Local 47 members be reassigned to Local 12 members. The PLA requirements, specifically the core employee language in the PLA, does not place the Contractors in a bind which Section 10(k) was intended to remedy.

2. LOCAL 12s GRIEVANCES DO NOT CONSTITUTE A CLAIM TO THE WORK BECAUSE THE PREVAILING WAGE RATES INCORPORATED BY REFERENCE IN THE PLA CLASSIFY THE WORK IN DISPUTE AS OPERATING ENGINEERS

Article II, Section 2.3 of the PLA (L12x1(Ex.4)) incorporates by reference the “Schedule As” or the Master Labor Agreements of the craft signatory to the PLA. All work of the hydraulic boom truck is classified as work that falls under the craft of the Operating Engineers. L12x13,14. Operating Engineers carries the prevailing wage classification for the hydraulic boom truck in Los Angeles County where the work in dispute took place and the PLA incorporates by reference the Prevailing Wages and Benefits. The Prevailing Wage Rates establish the minimum pay requirements for work considered to be construction on public works. See California Labor Code Section 1720 (2018).

This is supported by the testimony of Ray Van der Nat, attorney for the Los Angeles/Orange Counties Building and Construction Trades Council. He, along with Ken Hunt, Business Representative of Local 12 explained that the determination of what signatory Union’s referral system would apply to the hoisting work is determined by the Prevailing Wage Rates. Only Operating Engineers carries the prevailing wage rates for the hydraulic boom truck operation. L12x13,14. District Representative for Local 12, Dan Billy, also explained that the GPWD for HBT are adopted from Local 12’s MLA.

Article VIII, WAGES & BENEFITS of the PLA requires “[a]ll employees covered by this Agreement [to] be classified in accordance with work performed and by the [contractors] the

hourly wage rates for those classifications in compliance with the applicable prevailing wage rate determination established pursuant to applicable law.” L12x1(Ex.4). The PLA explicitly incorporates by reference the GPWD. Here, Local 12 would be the signatory union where contractors would refer to for procuring workers to perform the hydraulic boom truck operation when it was hoisting material.

3. LOCAL 12s HIRING VIOLATION GRIEVANCES DO NOT CONSTITUTE A CLAIM TO THE WORK

The Contractors and Local 47 argued at the hearing that because Local 12’s grievances request damages that this constitutes a claim to the work. However, the request for damages is part and parcel of the contractual violations.

Local 12’s MLA includes a liquidated damage clause or penalty for violations of the hiring provisions under Article II, Section N of the MLA. Local 12’s grievance cites to this provision, which specifies “compensatory damages” to the Operating Engineers Health and Welfare Fund for all hours worked by workmen not referred through Local 12’s hiring hall. This penalty provision requires any damages to go directly to the affiliated Operating Engineers Taft-Hartley Fund, not Local 12.

NLRB has held that “pay-lieu” grievances may raise jurisdictional dispute issues. *See Laborers' International Union of North America, Local 113 (Super Excavators, Inc.)*, 327 N.L.R.B. 113, n.6 (1998). However, in *Super Excavators, Inc.* the Board recognized that the Union that filed the grievance had also sought the assignment of the work in dispute. That is not the case here as explained above.

Additionally, simply filing a grievance against the Contractor performing the work does not constitute a competing claim for Section 8(b)(4)(D) purposes. The facts at hand are

distinguishable from other jurisdictional cases where the Board has recognized a claim to the work primarily because Local 12 is not seeking to have the work reassigned from Local 47 to Local 12. See *Carpenters S.E. Mo. Dist. Council (International Riggers)*, 306 NLRB 561 (1992). Local 12 is seeking the hiring provisions under a Project Labor Agreement enforced, not that the underlying operation of the hydraulic boom truck being performed by Local 12 members. Thus, the grievances themselves do not seek reassignment of the work, but rather an adherence to the contract.

Reasonable cause does not exist to believe that there are two competing claims to the disputed work because there has not been an identified “rival” group of employees. Local 12 has thoroughly explained that if it wanted to Comstock and Titan could have dispatched its Local 47 members to perform the work under the core employee language in the PLA

B. LOCAL 47 HAS NOT MADE A CREDIBLE THREAT AGAINST THE TWO CONTRACTORS

Local 47 has not made a credible threat to enforce its claim to the work, which would violate Section 8(b)(4)(D) of the Act. While the letters were sent to both Comstock and Titan there were also conversations between Local 47’s Business Manager and the Contractors, which indicate that these threats were not genuine.

II. THIS IS A CONTRACTUAL DISPUTE BETWEEN A BUILDING TRADES AFFILIATED UNION SIGNATORY TO THE PLA AND L.K. COMSTOCK AND TITAN SERVICES AND FALLS OUTSIDE OF THE SCOPE OF SECTION 10(k)

This is a dispute over the preservation of work. The employer itself created this alleged jurisdictional dispute by violating its duties under the PLA and giving the work to workers not dispatched through the hiring halls of the signatory unions. This was never work the employer was free to assign in this manner. In the typical situation protected by the statute an employer has the

right to assign to one group of workers or the other group and is caught in the middle of competing claims. That was not the situation here.

The reason(s) the employer advances for doing this “assignment” are irrelevant. Section 10(K) was intended ‘to protect employers from being helpless victims of quarrels that do not concern them at all.’ *NLRB v. Radio & Television Broadcast Engineers Local 1212 (Columbia Broadcasting)*, 363 U.S. 573, 580-581 (1961). It was not intended to address controversies of the employer’s own making. Otherwise, ‘an employer could always create a jurisdictional dispute between employee groups [simply] by reassigning work.’ *Longshore & Warehouse Union Local 62-B v. NLRB*, 781 F.2d 919, 925 (D.C. Cir. 1986). *Theatrical & Stage Employees Union Local 2, IASTSE (Event Media Inc.)* 366 NLRB No.123, n.4 (2018). Here, Local 12 has been performing the hoisting work in dispute on the Crenshaw/LAX Transit Corridor Project.

Moreover, counsel for the LA/OC Building Trades Ray Van Der Nat testified that the intention of bargaining for this PLA was to generate work opportunities for Unions affiliated by the Building Trades Department. Since its inception the PLA has provided work opportunities to perform the work strictly for Building Trades affiliated unions or those unions signatory to the PLA.

III. THE WORK IN DISPUTE IS WORK COVERED UNDER THE PROJECT LABOR AGREEMENT

The Contractors conflate the requirements imposed by the owner of the project and the rules for performing the Overhead Catenary System with the separate and independent labor obligations of Contractors under this PLA. The framing of the dispute by the Contractors as OCS work is too narrow and flawed. What’s at issue is a light-rail project. All projects have specific sub-categories of work. The Performance Requirements listing the OCS work does not exempt

the Contractors from abiding by their labor obligations. It doesn't specify what union members to employ from what craft. It cannot be assumed that the term "experienced linemen" meant Local 47 members.

In fact, everything in the PLA allows a contractor to use its own employees to perform the work subject to the core employee provisions under the referral system. The Contractors here failed to even attempt at utilizing the referral halls of the unions signatory to the PLA. Moreover, under the PLA and Local 12's MLA the contractor is the sole qualifier of the work capabilities. If the Contractors dispatched hydraulic boom truck operators and those workers could not perform the work, then the Contractors would be in their right to return these individuals back to Local 12's dispatch hall.

Local 12's dispatching procedures allow the Contractors to specify what background, experience, licenses, certifications, etc. it is looking for from their hydraulic boom truck whether those be with OCS experience or the like. Additionally, the forty-eight (48) hour provision in the PLA and Local 12's MLA allows Contractors to procure workers from outside the hiring hall if no qualified Hydraulic Boom Truck Operator is provided after 48 hours. Thus, the position that only Local 47 members can perform the work and not the craft labor of the Unions signatory to the PLA is not based on any regulation, statute, code or standard and in direct conflict with the PLA and Local 12's MLA.

There is no actual requirement that would prohibit the Contractors from using Local 12's hiring hall to procure workers to perform the HBT operation on the OCS portion of the Crenshaw/LAX Transit Corridor Project.

IV. THE NOTICE OF HEARING MUST BE QUASHED BECAUSE THERE IS A VOLUNTARY JOINT DISPUTE RESOLUTION FORMULA THAT BINDS ALL PARTIES

The Notice of Hearing should be quashed as the parties have agreed upon a method for the voluntary adjustment of this dispute. The Board has recognized the Plan as a method for the voluntary adjustment of jurisdictional disputes as long as the party unions and the employer are bound to submit jurisdictional disputes to the Plan. *Operating Engineers Local 13 9 (Allied Construction)*, 293 NLRB 604, 605-606 (1989); *Heavy Construction Laborers Local 60, LIUNA (General Contractors)*, 305 NLRB 762, 763 (1991); *International Union of Operating Engineers, Local 4*, 363 NLRB No. 17 (2015).

The NLRB must defer to this mutually agreed upon joint dispute resolution formula.

V. IF THE BOARD BELIEVES REASONABLE CAUSE EXISTS TO BELIEVE SECTION 8(b)(4)(D) HAS BEEN VIOLATED THEN LOCAL 12 POSITS THAT THE TRADITIONAL 10(k) FACTORS WEIGH IN FAVOR OF AWARDING THE WORK TO LOCAL 12 MEMBERS

If the Board deems it necessary to evaluate the merits of this dispute then work in question should be awarded to members of Local 12, based on the 10(k) factors.

Conclusion

Based on the foregoing reasons, the Notice of Hearing should be quashed.

Dated: September 19, 2018

Respectfully submitted,

/s/ Hugo Antonio Tzec
Hugo Antonio Tzec
House Counsel for
INTERNATIONAL UNION
OF OPERATING ENGINEERS,
LOCAL 12
150 East Corson Street
Pasadena, CA 91103
(626) 432-7389
h.tzec@iuoelocal12.org

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I electronically filed the foregoing document with the National Labor Relations Board using the Agency's E-Filing Program. I further certify that the foregoing document was served on all parties or their counsel of record by electronic mail.

Robert D. Vogel
Jackson Lewis P.C.
725 South Figueroa Street, Suite 2500
Los Angeles, CA 90017
Email: VogelR@jacksonlewis.com

Jonathan Cohen
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101
Email: jcohen@rsglabor.com

/s/ Hugo Antonio Tzec
Hugo Antonio Tzec